In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 379

EVERETT ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Three multiple-count indictments, returned in the United States District Court for the District of Kansas, charged petitioner with substantive violations of, and a conspiracy to violate, the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) (Tr. 2, 30, 48). Motions to dismiss the indictments (Tr. 9, 35, 54) were denied (Tr. 14, 41, 59). Thereafter petitioner requested permission to withdraw his plea of not guilty and to enter a plea of nolo contendere as to

one count of each indictment (Tr. 68, 71, 73).[1] The court accepted the pleas of nolo contendere and the United States Attorney dismissed the remaining counts of the indictments (Tr. 69, 71, 73). On December 13, 1963, petitioner was given concurrent sentences of imprisonment for two years (Tr. 15, 41, 59). At this time a thirty-day stay of execution as to each sentence was granted at petitioner's request to enable him "to get his affairs in order" (Tr. 80, 15, 42, 60). Copies of the Judgment and Commitment were filed on December 17, 1963 (Tr. 16, 42, 60). On January 9, 1964, petitioner filed motions in arrest of judgment and to suspend sentences (Tr. 16, 42-43, 60-61). On January 14, 1964 (after a hearing at which one of petitioner's three retained counsel presented a lengthy argument, and produced witnesses, in a plea for probation, Tr. 92 *et seq.*), the motions were denied (Tr. 112). Notices of appeal were filed on the same day (Tr. 25, 45, 62). On May 26, 1965, the appeals were dismissed as untimely filed (R. 3, 4). Petitioner seeks review of that ruling.[2]

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[1] The counts to which the pleas of nolo contendere were entered charged that petitioner, a registered dealer under the Packers and Stockyards Act, willfully and unlawfully caused false entries to be made in drafts drawn on bank accounts which became part of the records required pursuant to the Act, in violation of Section 402 of the Act (7 U.S.C. § 222) and Section 10 of the Federal Trade Commission Act (15 U.S.C. § 50) (Tr. 3, 30, 48).

[2] On June 28, 1965, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including July 23, 1965, and the petition was filed on July 22, 1965.

The 10-day period for taking an appeal, prescribed by Rule 37(a)(2) of the Federal Rules of Criminal Procedure, is mandatory and jurisdictional. *United States* v. *Robinson*, 361 U.S. 220. It cannot be extended even upon a showing (not made here) of excusable neglect. *Id.*, at 230. With respect to judgments filed on December 17, 1963, the motions to arrest judgment, filed on January 9, 1964, were not timely and therefore did not toll the running of the 10-day period under Rule 37(a)(2).[3] Petitioner argues that the trial court, in staying the execution of sentence for thirty days, *delayed* the judgment, and hence that the 10-day period for appeal commenced to run thirty days after the imposition of sentence. There is no merit to this contention. The judgment became final when the judgment of conviction setting forth the sentence was entered. Cf. *Corey* v. *United States*, 375 U.S. 169, at 171. The stay delayed the execution of sentence, not its imposition. *Berman* v. *United States*, 302 U.S. 211, 212. It did not in any way affect the finality of judgment.

Petitioner's contention is completely answered by *Berman* v. *United States*, *supra*, 302 U.S. at 212:

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[3] Since the motions to arrest judgment were filed more than 10 days after judgment, the question does not arise here (a question left open by the decision of this Court in *Lott* v. *United States*, 367 U.S. 421) as to whether Rule 37(a)(2) is modified by Rule 34 so as to make the motions timely only if made within 5 days after determination of guilt. See *Joe Robert Collier* v. *United States*, petition for writ of certiorari pending, No. 331 Misc., this Term.

> * * * Petitioner was convicted and sentenced. Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller* v. *Aderhold*, 288 U.S. 206, 210; *Hill* v. *Wampler*, 298 U.S. 460, 464. Here, the imposition of the sentence was not suspended, but only its execution. The sentence was not vacated. It stood as a final determination of the merits of the criminal charge. To create finality it was necessary that petitioner's conviction should be followed by sentence (*Hill* v. *Wampler*, *supra*) but when so followed the finality of the judgment was not lost because execution was suspended. In criminal cases, as well as civil, the judgment is final for the purpose of appeal "when it terminates the litigation * * * on the merits" and "leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.*, 108 U.S. 24, 28; *United States* v. *Pile*, 130 U.S. 280, 283; *Heike* v. *United States*, 217 U.S. 423, 429.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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